

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MIGUEL A. CRUZ, and JOHN D. HANSEN,)	Case No. 07-2050 SC
individually and on behalf of all)	07-4012 SC
others similarly situated,)	
Plaintiffs,)	Consolidated
v.)	ORDER DENYING
DOLLAR TREE STORES, INC.,)	DEFENDANT'S MOTIONS
Defendant.)	FOR SUMMARY JUDGMENT
_____)	AS TO JOHN HANSEN AND
ROBERT RUNNINGS, individually and)	<u>ROBERT RUNNINGS</u>
on behalf of all others similarly)	
situated,)	
Plaintiff,)	
v.)	
DOLLAR TREE STORES, INC.,)	
Defendant.)	
_____)	

I. INTRODUCTION

This matter comes before the Court on the Motions for Summary Judgment ("Motions") submitted by the defendant Dollar Tree Stores "Defendant" or "Dollar Tree"). Cruz Docket No. 48, Runnings Docket No 36. The plaintiffs John D. Hansen ("Hansen") and Robert Runnings ("Runnings") each filed an Opposition and Dollar Tree submitted replies. Cruz Docket Nos. 61, 63; Runnings Docket Nos.

49, 50. For the following reasons, Dollar Tree's Motions are DENIED.

II. BACKGROUND

Miguel Cruz and Hansen, on behalf of themselves and all others similarly situated, filed a class action against Dollar Tree, alleging that they were improperly classified as exempt managers and denied wages for overtime. First Am. Compl., Cruz Docket No. 1, ¶¶ 2-4. Runnings filed a substantially similar class action in California Superior Court, which Dollar Tree removed to this Court. Runnings Docket No. 1. On August 30, 2007, the Court signed a Related Case Order after finding that the two cases were similar. Cruz Docket No. 34; Runnings Docket No. 21. On November 20, 2007, the Court signed a Joint Stipulation and Proposed Order for Consolidation of Actions signed by counsel for Cruz, Hansen, Dollar Tree, and Runnings. Cruz Docket No. 45; Runnings Docket No. 33.

III. OBJECTIONS TO DECLARATIONS AND REQUESTS FOR JUDICIAL NOTICE

As a preliminary matter, the Court addresses the various objections raised by the parties to certain declarations.

A. Hansen Declaration

Dollar Tree objects to numerous statements in the declaration filed by Hansen in Support of his Opposition to Summary Judgment. Docket Nos. 60 (Hansen Decl.), 64 (Objections). Dollar Tree argues that statements in the declaration contradict statements made by Hansen at a prior deposition and that the Court should

1 therefore construe the declaration as a "sham" declaration. "The
2 general rule in the Ninth Circuit is that a party cannot create an
3 issue of fact by an affidavit contradicting his prior testimony."
4 Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir.
5 1991).

6 The Court reviewed Dollar Tree's objections, Hansen's
7 declaration, and Hansen's deposition testimony. Contrary to
8 Dollar Tree's arguments, the Court cannot conclude that Hansen's
9 declaration is "'sham' testimony that flatly contradicts earlier
10 testimony in an attempt to 'create' an issue of fact and avoid
11 summary judgment." Id. at 266-67. For example, Dollar Tree
12 objects to Hansen's statement in his declaration that "Dollar Tree
13 discouraged creativity." Hansen Decl. ¶ 10. During his
14 deposition, however, when asked by counsel for Dollar Tree whether
15 "the merchandising department at Dollar Tree encourages store
16 managers to be creative in setting up displays," Hansen replied
17 "Not really." Hansen Dep., Ex. A to Hirsch Decl., Cruz Docket No.
18 49, at 54. In another example, Dollar Tree objects to Hansen's
19 statement in his declaration that he had a clear recollection of
20 spending more than half of his time stocking shelves and working
21 the cash register. Hansen Decl. ¶ 7. Dollar Tree argues that
22 this directly contradicts his deposition testimony. During his
23 deposition, however, when Hansen was asked whether he could recall
24 what percentage of his time was spent stocking shelves, he
25 replied: "I can't really say specifically, but quite a bit. I
26 just remember that being quite a bit of my time." Hansen Dep.,
27 Ex. A to Supp. Hirsch Decl., Cruz Docket No. 67, at 324. The fact
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1 that Hansen later was able to state that "quite a bit" was more
2 than half of his time does not lead to the conclusion that his
3 declaration is a sham declaration.¹ Dollar Tree's remaining
4 objections to portions of Hansen's declaration are equally
5 unavailing and are thus OVERRULED.

6 **B. Runnings Declaration**

7 Dollar Tree also objects to various statements in the
8 declaration of Runnings. Dollar Tree argues that much of what
9 Runnings states in his declaration is directly contradicted by
10 statements made by Runnings during his deposition. After
11 reviewing the declaration and the excerpts of the deposition
12 testimony provided by Dollar Tree, the Court finds that the
13 alleged contradictions amount to little more than minor
14 inconsistencies that are not uncommon when one person testifies at
15 two different times, months apart, about the same events. Dollar
16 Tree's objections are OVERRULED.

17 **C. Jacobson-Allen and Hernandez Declarations**

18 Runnings objects to the declarations of Charlotta Jacobson-
19 Allen and Carlos Hernandez submitted in support of Dollar Tree's
20 Motions. Runnings Docket Nos. 39, 41. The Court need not reach
21 this issue, as Dollar Tree's Motion for Summary judgment is
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23 ¹ Hansen does state in his declaration that Dollar Tree's
24 attorney never asked him how much time, or what percentage of his
25 time, was spent stocking and working the cash register. Hansen
26 Decl. ¶ 8. This is clearly incorrect, as a review of Hansen's
27 deposition demonstrates. Hansen Dep., Ex. A to Supp. Hirsch Decl.
at 323-24. Nonetheless, that Hansen could not remember every
question he was asked during the course of a deposition spanning
more than a day does not transform his declaration into a sham
declaration.

1 denied.

2 **D. Request for Judicial Notice**

3 Both parties submitted requests for judicial notice. Dollar
4 Tree seeks judicial notice of an order filed in Williams v. Dollar
5 Tree Stores et al., Case No. 01CC00329 (Sup. Ct. Cal., Orange
6 County, June 14, 2005) (Order and Judgment Granting Final Approval
7 of Settlement). Def.'s Request for Judicial Notice ("RJN"),
8 Runnings Docket No. 38. The request is GRANTED. See Hott v. City
9 of San Jose, 92 F. Supp. 2d 996, 998 (N.D. Cal. 2000) (stating
10 "[p]ursuant to Federal Rule of Evidence 201, the Court may take
11 judicial notice of papers filed in other courts").

12 Although this request is granted, the relevance of this
13 document is less than clear. Dollar Tree, in its Motion, asserts
14 that "Runnings, as a putative class member, is prevented from
15 asserting claims relating to overtime and meal and rest break
16 violations arising before December 11, 2004" because of the Order
17 and Judgment cited above. Mot. at 19-20. Nowhere in the Order
18 and Judgment, however, is the class of that action defined. This
19 Court, therefore, has no way of knowing whether Runnings would
20 have been part of that class. In addition, although Dollar Tree
21 asserts that December 11, 2004, is the operative date, the Court,
22 after reviewing the state court order several times, finds no
23 mention of this date. Instead, the Order and Judgment clearly
24 states that the effective date is "deemed by the Court to be the
25 date when this order and judgment is entered and filed by the
26 Court." RJN ¶ 7. That date was July 14, 2005.

27 For these reasons, Dollar Tree's request for judicial notice
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1 is granted, but its argument that Runnings is somehow precluded
2 from asserting claims arising before December 11, 2004, is wholly
3 unsupported. Dollar Tree is free to raise this argument again so
4 long as it provides justification for its assertion.

5 Runnings seeks judicial notice of a declaration filed by an
6 attorney in another case filed in state court. Runnings' RJN,
7 Runnings Docket No. 53. The relevance of this document to the
8 current Motion is unclear. Runnings' request is therefore DENIED.

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10 **IV. LEGAL STANDARD**

11 Entry of summary judgment is proper "if the pleadings, the
12 discovery and disclosure materials on file, and any affidavits
13 show that there is no genuine issue as to any material fact and
14 that the movant is entitled to judgment as a matter of law." Fed.
15 R. Civ. P. 56(c). "Summary judgment should be granted where the
16 evidence is such that it would require a directed verdict for the
17 moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250
18 (1986). Thus, "Rule 56(c) mandates the entry of summary judgment
19 . . . against a party who fails to make a showing sufficient to
20 establish the existence of an element essential to that party's
21 case, and on which that party will bear the burden of proof at
22 trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In
23 addition, entry of summary judgment in a party's favor is
24 appropriate when there are no material issues of fact as to the
25 essential elements of the party's claim. Anderson, 477 U.S. at
26 247-49.

27 A party moving for summary judgment on an issue where it does
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1 not have the ultimate burden of persuasion at trial may satisfy
2 its initial burden of production in one of two ways. "The moving
3 party may produce evidence negating an essential element of the
4 nonmoving party's case, or, after suitable discovery, the moving
5 party may show that the nonmoving party does not have enough
6 evidence of an essential element of its claim or defense to carry
7 its ultimate burden of persuasion at trial." Nissan Fire & Marine
8 Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1106 (9th Cir. 2000).

9 "Once the moving party carries its initial burden, the adverse
10 party may not rest upon the mere allegations or denials of the
11 adverse party's pleading, but must provide affidavits or other
12 sources of evidence that set forth specific facts showing that
13 there is a genuine issue for trial." Devereaux v. Abbey, 263 F.3d
14 1070, 1076 (9th Cir. 2001) (internal quotation marks omitted).

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16 **V. DISCUSSION**

17 After review of the parties' submissions, the Court finds
18 that triable issues of fact remain as to whether Plaintiffs'
19 employment positions with Dollar Tree are exempt under both the
20 California Labor Code and the Fair Labor Standards Act. Dollar
21 Tree's Motions are therefore DENIED.

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1 **VI. CONCLUSION**

2 For the reasons discussed herein, the Court DENIES
3 Defendant's Motions for Summary Judgment. The parties are to
4 appear for a status conference on Friday, August 1, 2008, at 10:00
5 a.m. in Courtroom #1.

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8 IT IS SO ORDERED.

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10 Dated: July 8, 2008



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12 UNITED STATES DISTRICT JUDGE